Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

* * * *

CARLTON MILLER,

Petitioner,

v.

JIM PURKETT,

Respondent.

* * * *

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

* * * *

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QUESTION PRESENTED

I. WHETHER THE COURT OF APPEALS PROPERLY DETERMINED THAT THE PETITIONER'S HABEAS CORPUS CLAIM THAT HIS GUILTY PLEA WAS INVOLUNTARY BECAUSE HE DID NOT UNDERSTAND WHAT HE WAS CHARGED WITH AND WAS ACTUALLY INNOCENT WAS PROCEDURALLY DEFAULTED.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

* * * *

CARLTON MILLER,

Petitioner,

v.

JIM PURKETT,

Respondent.

* * * *

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

* * * *

The Petitioner, Carlton Miller, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit[1] rendered in these proceedings on November 21, 1995.

[1]The parties to the proceeding in the Court of Appeals were Carlton Miller and Jim Purkett, the Superintendent of the Farmington Correctional Center, Farmington, Missouri.

OPINION BELOW

The United States Court of Appeals for the Eighth Circuit summarily affirmed the district court in this cause without opinion in its Cause no. 95-3336WMKC. The court's order is reprinted in the appendix to this petition at page 1a, *infra*. For the convenience of this court, the opinion of the U.S. District Court denying relief is reprinted in the appendix to this petition beginning at page 2a, *infra*.

JURISDICTION

The original order of the United States Court of Appeals for the Eighth Circuit was entered September 29, 1995. A timely motion for rehearing was overruled on November 21, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions involved in this case are set out in full in the Appendix.

Mo. Sup. Ct. R. 24.035

Mo. Sup. Ct. R. 91.01

MO. REV. STAT. §565.050.1

MO. REV. STAT. §562.016.3

U.S. Const., amend. XIV

U.S. Const., amend. VI

28 U.S.C. §2254

STATEMENT OF THE CASE

Jurisdiction in this federal habeas corpus case was founded upon 28 U.S.C. §2241 and §2254.

On December 22, 1987, petitioner was convicted upon a plea of guilty of the Missouri offense of first degree assault as defined in MO. REV. STAT. §565.050, upon an allegation that he knowingly caused serious physical injury to James Hodgdon. Under Missouri law, the judge was required to find that there was a factual basis for petitioner's plea of guilty prior to entering a judgment of conviction. Mo. Sup. Ct. R. 24.02(e). The petitioner's testimony was used to establish the evidentiary basis for the plea. After admitting that he had cut the victim with a knife, petitioner testified as follows:

> Q. "Did you know it was wrong to cut him?"
>
> Petitioner: "Yes."
>
> Q. "--when you didn't see a weapon?"
>
> Petitioner: "Well, --"
>
> Q. "Let me rephrase it. Go ahead?"
>
> Petitioner: "My reaction was instinctive behavior."

Transcript of guilty plea, pp. 20-21, as corrected.

When originally transcribed, the petitioner's last statement read, "My reaction was indicative (sic) behavior."

After his conviction, petitioner filed an original motion for post-conviction relief under Mo. Sup. Ct. R. 24.035 on

April 14, 1988. The rule had come into effect on January 1 of that year, just ten days after petitioner was sentenced. Prior to that time, Missouri post-conviction remedies had been subject to Mo. Sup. Ct. R. 27.26, which had no time limits and allowed for successive motions. Petitioner's motion was timely under Rule 24.035's transitional provisions.

The post-conviction motion alleged, *inter alia*, that petitioner was denied effective assistance of counsel in violation of U.S. Const. amend. VI because of trial counsel's failure adequately to investigate the assault charge against petitioner and to develop evidence that the alleged victim of the assault was the initial aggressor, that petitioner was denied effective assistance of counsel because of trial counsel's failure to take Hodgdon's deposition, and that as a result of trial counsel's failure to investigate the facts and depose James Hodgdon, petitioner was unable to make an informed decision to plead guilty.

Pursuant to Mo. Sup. Ct. R. 24.035, the Missouri Public Defender was appointed to represent petitioner. His counsel filed a brief amended motion, presumably after reviewing the transcript of petitioner's guilty plea. A hearing was conducted on petitioner's motion for post-conviction relief, and relief was denied. Petitioner did not appeal. He was advised by his appointed counsel that an appeal would have little chance of success. He was never advised, however, that failure to appeal might prevent his raising the issues contained in the post-conviction motion in federal court.

Petitioner then realized that the transcript in his guilty plea proceeding was in error in the use of the word "indicative" rather than "instinctive." Proceeding *pro se*, he petitioned the trial court to amend the transcript. On March 31, 1992, the trial court entered an order correcting the transcript. Petitioner also learned at about this time that his "instinctive"

behavior was not the conduct with which he was charged.

Petitioner then filed a petition for writ of habeas corpus with the circuit court of St. Francois County pursuant to Mo. Sup. Ct. R. 91, alleging that his guilty plea was entered without a factual basis, in violation of his rights under Missouri law and the Due Process Clause, and alleging that he was denied effective assistance of counsel when his counsel failed to inform him of the elements of the offense with which he was charged. He supported his petition with an affidavit in which he stated,

> The grounds for this motion [for writ of habeas corpus] were not known to me at the time of the filing of that motion. While the transcript in this case was available to me at the time the motion under Sup. Ct. R. 24.035 was filed, I was in a state of shock at that time and was unable to comprehend the significance of the error. Further, it was not until much later that I learned that the state was required to prove that I acted intentionally. Because my trial counsel never told me this, I was unable to raise this ground in my motion.

The petition was denied citing a procedural bar under the then-current Missouri Supreme Court case of *White v. State*, 779 S.W.2d 571 (Mo. 1989). The court noted that the claims were "cognizable under Rule 27.26 (repealed) and 24.035" and that "petitioner has not alleged and shown any special circumstances which would allow him to proceed in Habeas Corpus..."

Under Missouri law, no appeal lies from the denial of a writ of habeas corpus. Therefore, petitioner filed a new petition in the Missouri Court of Appeals for the Eastern District, citing the same grounds. That court summarily denied

the petition without any mention of any reason, including procedural bar. Finally, petitioner filed a petition with the Missouri Supreme Court. The Missouri Supreme Court requested that petitioner provide the court with the entire transcript of the guilty plea proceeding. The court then summarily denied the petition.

Petitioner then filed his motion under 28 U.S.C. §2254, alleging the same grounds cited in his state habeas corpus petitions. After reviewing the state's response and petitioner's traverse, the district court denied relief without a hearing.

In its opinion, the court first determined that the procedure for raising post-conviction claims under Mo. Sup. Ct. R. 24.035 was adequate to support a procedural bar. Then, the court held that the summary denial of relief by the Missouri Court of Appeals and Missouri Supreme Court did not constitute a review sufficient to overcome the procedural bar because, under previous Missouri law, petitioner's claim could not be raised by state habeas corpus.

The court then held that petitioner had failed to show "cause" for his default. The court reasoned that because petitioner had the uncorrected transcript available to him at the time he filed his Mo. Sup. Ct. R. 24.035, motion, he could have discovered the claim. Finally, the court held that petitioner's contention that the evidence showed that he was innocent of the crime did not meet the "manifest injustice" exception of *Schlup v. Delo*, 115 S.Ct. 851, 867 (1995) because petitioner had admitted stabbing the victim.

The Court of Appeals summarily affirmed the district court without briefing. See Appendix, p. 2a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IN THIS CASE IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *HARRIS V. REED, COLEMAN V. THOMPSON* AND *SCHLUP V. DELO*.

A. ADEQUATE STATE GROUND

The Eighth Circuit has extended the rule of *Coleman v. Thompson*, 111 S.Ct. 2546, 2557 (1991), and *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043 (1989), far beyond the logical reach of those decisions. In *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043 (1989), this court held,

> [A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar.

The court clarified this ruling in *Coleman v. Thompson*, 111 S.Ct. 2546, 2557 (1991), holding that federal review was permitted "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Nonetheless, the Eighth Circuit, followed by the district court here, has interpreted these opinions to allow for the denial of review when the state court decision states NO ground for denying relief. The Court of Appeals bases this ruling on ITS interpretation of other Missouri precedents.

In *Byrd v. Delo*, 942 F.2d 1226 (8th Cir. 1991) the court held that an unexplained denial of a Missouri petition for habeas corpus can fairly be construed to mean that the decision was based on a state procedural bar. The *Byrd* decision is

based on the court of appeals' analysis of *White v. State*, 779 S.W.2d 571 (Mo. 1989), which purported to explain the circumstances in which habeas corpus relief was available. The Missouri Supreme Court has since broadened and explained this holding in *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993). Nonetheless, with few exceptions, the court has continued to rely on *Byrd* to deny relief on the ground of procedural bar even when the state court decision is not expressly based on that ground. See, e.g. *Charron v. Gammon*, 69 F.3d 851, 857 (8th Cir. 1995): "Charron's attempts to distinguish *Byrd* are unpersuasive."

Two specific considerations militate against that interpretation here. First, the Missouri Supreme Court requested, and received, the transcript of petitioner's guilty plea proceeding before ruling in his case. Such an action is inconsistent with a finding of procedural bar, in that the court could have determined that the procedural bar precluded review without the transcript. Second, petitioner presented the district court with the fact that the Missouri Supreme Court frequently enters orders such as the following, which expressly rely on a procedural bar.

> Relator's petition for writ of habeas corpus discloses no ground for relief that could not have been asserted either in the initial appeal or in a motion filed pursuant to Rule 27.26 or Rule 24.035, all of which have been finally determined or are now procedurally barred, and said petition discloses no other ground that is not procedurally barred.

The approach of the court of appeals substitutes the reasoning of the federal court for the unexplained reasoning of the state court. Such an approach is not only unfair to habeas corpus petitioners, it is inconsistent with the very poli-

cies which underlie the procedural bar rule as expressed in *Harris* and *Coleman*. The policy of these cases is that the reasoning and rules of state courts should be respected by the federal court except where necessary to prevent a fundamental miscarriage of justice. Obviously, the Missouri Supreme Court is fully capable of writing opinions or orders explaining its rulings. When it does not do so, it is the height of intrusive arrogance for the federal district and appellate courts to formulate explanations for the court.

A fair reading of *Coleman* and *Harris* is that a summary denial of relief by a state court cannot meet the requirement of *Harris* that:

> [A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar.

Harris v. Reed, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043 (1989. In such a case, the independent state bar is simply not "clear from the face of the opinion." *Coleman v. Thompson*, 111 S.Ct. 2546, 2557 (1991).

Because the district court and court of appeals misread *Harris* and *Coleman*, review by this court is appropriate and necessary.

B. MANIFEST INJUSTICE

The district court initially determined that petitioner's claim that he lacked the mental element required to commit the crime of which he was convicted was a matter of "legal" rather than "factual" innocence, and therefore did not fall within the purview of *Schlup v. Delo*, 115 S.Ct. 851, 863 (1995).

In *Schlup*, this court held, "[T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata." The court noted further,

> [T]he individual interest in avoiding injustice is most compelling in the context of actual innocence... That concern is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372, 90 S.Ct. 1068, 1077, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). See also Starkie, *Evidence* 751 (1824) ("The maxim of the law is ... that it is better that ninety-nine ... offenders shall escape than that one innocent man be condemned"). See generally Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U.L.Rev. 979, 980-981 (1993)

Schlup v. Delo, 115 S.Ct. 851, 866 (1995). The court then went on to hold that to excuse a procedural default under the "actual innocence" exception, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 115 S.Ct. 851, 867 (1995).

The application of the *Schlup* standard to the situation where the defendant entered a plea of guilty has not yet been explained by this court. The Eighth Circuit has held that a claim that the petitioner lacked the mental element of a crime is a "factual innocence" claim within the purview of *Schlup*. *Jones v. Delo*, 56 F.3d 878 (8th Cir. 1995). And, in *Brownlow v. Groose*, 66 F.3d 997 (8th Cir. 1995), the Eighth Circuit has also held that the *Schlup* standard could apply in a guilty plea case, although the petitioner there was unable to satisfy it.

Here, contrary to the finding of the district court, the record establishes that petitioner falls within the exception to the procedural bar rule described in *Schlup*. He testified **at his guilty plea hearing** that he acted instinctively. Although he answered affirmatively to his attorney's *pro forma* question concerning the elements of the offense, his volunteered explanation is clearer evidence of his understanding.

The statute under which petitioner was convicted, MO. REV. STAT. §565.050.1, provides, "A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person." This statute clearly requires a culpable mental state. MO. REV. STAT. §562.016 provides, "A person 'acts knowingly'... with respect to his conduct... when he is aware of the nature of his conduct..."

Instinctive behavior is the opposite of knowing behavior. Webster's New Collegiate Dictionary defines "instinctive" as follows: Prompted by natural instinct or propensity; **arising spontaneously and being independent of judgment or will.**" (G.C. Merriam Co., Springfield, MA 1980) (emphasis added).

In acting instinctively, petitioner was acting, not on the forces of knowledge, but on the force of natural law. Natural law has been truth and reality for man for as long as man ever existed. The criminal law recognizes this fact; very seldom is behavior criminalized without any mental element.

Thus, petitioner's volunteered characterization of his behavior as "instinctive" negated the mental state required to commit the offense. It is true that earlier in the transcript, petitioner affirmed his counsel's recitation of the charge. However, contrary to the finding of the district court, he did not admit the offense at that time. The exchange was as follows:

> Q. On the assault. *The assault charges*, that on June 29, 1967 in Jackson County, State of Missouri, you knowingly caused serious injuries to James Hodgon by cutting him, is that correct?
>
> Petitioner: Yes.

(Guilty Plea Transcript, p. 19, emphasis added.) Thus, petitioner did not, at this point, admit that he was guilty as charged. Rather, he acknowledged the language of the charge. When given the opportunity to explain his actions during the portion of the hearing in which the factual basis of the plea was to be established, petitioner's response clearly showed that he did NOT admit to the culpable mental state necessary to the offense.

The court thus had before it a person who had not admitted all of the elements of the crime and therefore, under Missouri law, should have rejected the plea. This is not a situation in which a criminal defendant admits the crime and then later attempts to persuade the court that he is innocent. Rather, it is a case in which guilt was never established in the first place. This case thus presents the court with an opportunity to clarify the application of *Schlup* in the context of a guilty plea.

II. THE COURT OF APPEALS' DECISION THAT RELIEF IS PROCEDURALLY BARRED IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

The Eighth Circuit and district court decisions followed a line of decisions from that court which is not only harsher in imposing procedural bars than this court. It is also harsher than that of several other courts of appeals. Because of this lack of uniformity, review by this court is needed.

In *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995), the court found no procedural bar where the state court of last review stated that a claim was waived, but then analyzed it on the merits. The situation here is substantially similar, yet the court here indulged in a presumption that no review on the merits occurred. In *Glock v. Singletary*, 65 F.3d 878 (11th Cir. 1995), the court held that a summary denial entitled the petitioner to a consideration by the federal court on the merits of the case.

In *Upshaw v. Singletary*, 70 F.3d 576 (11th Cir. 1995), the court permitted review where the state procedure was "manifestly unfair." Petitioner here argued that the circumstances under which he was required to file his postconviction motion, coupled by the error in his transcript, resulted in a procedure which was unfair at least as applied to him. In *Medina v. Barnes*, 71 F.3d 363 (10th Cir. 1995), the court found "manifest injustice" where the petitioner showed that evidence he needed was unavailable at his postconviction hearing, and also showed a probability that he was innocent. See also *Reed v. Scott*, 70 F.3d 844, 847 (5th Cir. 1995) (Where the state court refused to consider Reed's *Batson v. Kentucky* discriminatory jury selection claim because he did not provide a record of the entire voir dire, the rule used "'does not even remotely satisfy the requirement... that an adequate and independent state

procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed by the time' it was applied." citing *Ford v. Georgia*, 498 U.S. 411, 424 (1991).

Other circuits are even harsher in their application of *Coleman* and *Harris* to bar review than the Eighth Circuit. The Fourth Circuit has held a claim procedurally barred where the state court ruling "at least in part" rested on a state procedural bar, even though the court reviewed the claim on its merits. *Kornahrens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995). Similarly, in some cases, the Eleventh Circuit has held that

> When a state court addresses both the independent state procedural ground and the merits of the federal constitutional claim, the federal court should apply the state procedural bar and decline to reach the merits of the claim.

Marek v. Singletary, 62 F.3d 1295, 1301-1302 (11th Cir. 1995), citing *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir.), *cert. denied* 115 S.Ct. 673 (1994).

This panoply of applications of the rule makes guidance from this court important, because it is a clear violation of due process for the availability of a federal remedy to depend on the circuit in which the remedy is sought.

III. THE COURTS' INCREASING RELUCTANCE TO ENTERTAIN CHALLENGES TO THE CONSTITUTIONALITY OF STATE CONVICTIONS ON THE GROUNDS OF PROCEDURAL BAR RESULTS IN MANIFEST INJUSTICE IN A GROWING NUMBER OF CASES.

The remedy of habeas corpus is the last cry for relief from injustice which a convicted person can make. Historically, habeas corpus has provided a forum for the redress of injustice which, through inattention, inadequate state procedure, or ignorance, has not been addressed earlier. As this court said in *Schlup v. Delo*, 115 S.Ct. 851, 867 (1995), "[T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy." While petitioner concedes that principles of finality and deference to the judgment of state courts have a place in determining whether relief is appropriate, the pendulum has swung far in the direction of denying relief on the flimsiest of procedural reasons.

In *Fay v. Noia*, 372 U.S. 391 (1963), the court held that review of a prisoner's claim in federal court was available unless it was shown that the prisoner had "deliberately bypassed" other available remedies. This was limited by *Wainwright v. Sykes*, 433 U.S. 72 (1977), requiring a showing of "cause and prejudice" before a procedural default would be excused. Since that time, the definition of "cause" has been increasingly limited. See, for example, *Engle v. Isaac*, 456 U.S. 107 (1982) (Futility of objecting is not "cause" to overcome a procedural bar); *Smith v. Murray*, 477 U.S. 527 (1986) (Competent counsel's election to omit a claim based on the likelihood of success is not "cause"); *Coleman v. Thompson*, 111 S.Ct. 2546 (1991) (Ineffective assistance of post-conviction counsel cannot be "cause.")

Under these circumstances, the realm of cases in which review is denied because of procedural bar has grown, and the realm of cases in which review is granted has decreased. Judge Heaney of the Eighth Circuit has expressed the problem well in his dissent in *Whitmore v. Avery*, 63 F.3d 688, 693 (8th Cir. 1995):

> As this case amply demonstrates, the law of procedural bar has become a serious impediment to our obligation to ensure that justice is done. Courts including this one have lost sight of the critical importance of habeas corpus review to the preservation of the liberties and rights secured by our federal Constitution. Habeas corpus, once taken seriously as the 'great writ of liberty,' now bears that label with irony, if at all... No longer can it be said that 'fundamental fairness is the central concern of the writ of habeas corpus.'

(citing *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

Petitioner therefore urges this court to return to its mission as the final, inalterable source of relief from injustice. Only if it does so will confidence in the integrity of the criminal justice system be maintained.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-3336WMKC	*	
	*	
Carlton E. Miller,	*	Appeal from the United
	*	States District Court for
appellant,	*	the Western District of
	*	Missouri
vs.	*	
	*	
Jim Purkett, Supt.,	*	
	*	
Appellee.		

Judgment

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed.

September 29, 1995

Order Entered at the Direction of the Court

(signed) Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Carlton E. Miller,	*	
Petitioner,	*	
v.	*	No. 94-1115-CV-W-2
Jim Purkett,	*	
Respondent.	*	

OPINION AND ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS

Pending before this court is petitioner's petition for writ of habeas corpus and request for evidentiary hearing. Petitioner filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his 1987 conviction and sentence for first degree assault which was entered in the Circuit Court of Jackson County, Missouri.

Petitioner raises the following grounds for relief: (1) petitioner's conviction was entered in violation of due process in that it was not supported by evidence that petitioner acted "knowingly"; (2) petitioner was denied ineffective assistance of counsel in that counsel (a) did not explain the required mental state to petitioner, (b) failed to obtain the deposition of the alleged victim of the assault, (c) failed to withdraw petitioner's guilty pleas upon hearing petitioner's testimony concerning the lack of intent, (d) failed to challenge a prior conviction used to enhance petitioner's punishment and based on a repealed statute, and (e) misinformed petitioner that he would receive two

life sentences if convicted; (3) petitioner's pleas was not knowing and voluntary in that petitioner misunderstood the element of intent; and (4) petitioner's pleas was not knowing and voluntary due to ineffective assistance of counsel.

Petitioner filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 24.035 in the Circuit Court of Jackson County, Missouri. Following an evidentiary hearing, petitioner's motion was denied. Petitioner failed to appeal the denial of his motion for post-conviction relief, stating that he "was informed by my court-appointed attorney that I would be very unlikely to succeed on appeal and I had no confidence in the court." (Petitioner's Application for Habeas Corpus, p. 5).

Respondent contends that all of the grounds raised by petitioner are procedurally barred from review by this court by either failing to present his claims in his motion for post-conviction relief or failing to appeal the denial of that motion. *Boyd v. Groose*, 4 F.3d 669 (8th Cir. 1993). Petitioner contends, however, that Missouri Supreme Court Rule 24.035 cannot act as an independent and adequate procedural bar to petitioner's grounds for relief.

Petitioner asserts that at the time he was attempting to challenge his state court conviction, Missouri had recently changed the procedures for collateral review. As of January 1, 1988, Missouri Supreme Court rule 24.035 was effective for those individuals who were challenging the validity of a guilty plea. Rule 24.035(1) provided that if petitioner's sentence had been pronounced prior to January 1, 1988, and no prior motion had been filed pursuant to rule 27.26, a motion under Rule 24.035 must have been filed by June 30, 1988. Petitioner filed his motion for post-conviction relief on April 14, 1988. Rule 24.035, which replaced Rule 27.26, set time limits on the filing of such motions which were not imposed on motions

pursuant to Rule 27.26.

Petitioner asserts, relying in part on *Ashby v. Wyrick*, 693 F.2d 789, 793-94 (8th Cir. 1982), that Missouri Rule 24.035 is not an independent and adequate state procedural bar in that the procedures are confusing and hostile to the enforcement of petitioner's constitutional rights and acted to deny petitioner a fair opportunity to present his constitutional claims in Missouri courts. To support his position, petitioner argues that the time limits imposed by the rule place impermissible burdens on petitioner's exercise of his rights. Petitioner additionally contends that at the time petitioner filed his motion, there had been "no Missouri appellate decisions interpreting the ambiguous provisions of Mo. Sup. Ct. R. 24.035." (Petitioner's Traverse, p. 12 (emphasis in original)). Therefore, petitioner argues, he was unaware that the requirement to raise all grounds "known to him"[1] included the duty to present claims which petitioner did not know but which he could have discovered. Petitioner states that it was reasonable for him to believe that Missouri Supreme Court Rule 91 provided him a forum to present later discovered claims not presented in his motion for post-conviction relief.[2]

1 Rule 24.035(d) provides that the contents of a motion to vacate:

> shall include every ground known to the movant for vacating, setting aside or correction the judgment or sentence. The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion.

2 Petitioner filed three separate motions pursuant to Missouri Supreme Court Rule 91 for habeas corpus relief. In his state habeas, petitioner presented the grounds raised in the present petition which were not included in his state motion for post-conviction relief.

The adequacy of a state procedure is a question of federal law. *Williams v. Lockhart*, 873 F.2d 1129, 1131 (8th Cir.), *cert. denied*, 493 U.S. 942 (1989). In *Williams*, the Eighth Circuit found that if "the state procedural rule is unclear, or has been inconsistently applied, or appears to be a new rule designed to thwart the assertion of federal rights" then such a rule "valid though it may be for purely state-law purposes, would not suffice to bar (federal) habeas review." 873 F.2d at 1131-32.

Although petitioner questions the validity of the time limits imposed by Rule 24.035, it is clear that in petitioner's case, the rule's time limits did not provide him an inadequate state procedure. *See Sloan v. Delo*, No. 94-2122, 1995 WL 286719 at *4 (8th Cir. May 15, 1995). Judgment was entered against petitioner on December 21, 1987. Petitioner had until June 30, 1988 to file his motion for post-conviction relief and actually did so on April 14, 1988. Therefore, petitioner has failed to show how state procedures were inadequate in his case based on time limitations imposed by the rule. Furthermore, the time limits set forth in Rule 24.035 have been found to be mandatory and constitutional. *See Duvall v. Purkett*, 15 F.3d 745, 748 n.6 (8th Cir.), *cert. denied*, 114 S. Ct. 2753 (1994); *Day v. State*, 770 S.W. 2d 692, *cert denied*, 493 U.S. 866 (1989). Nor can petitioner argue that Rule 24.035 is an inadequate state ground based on the argument that the time appointed counsel is provided to prepare an amended motion is insufficient. *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992) (no constitutional right to post-conviction counsel); *Sloan v. Delo*, 1995 WL 286719 at *5 ("It would be inconsistent to conclude that a state's post conviction procedure is adequate if no counsel is provided, but inadequate if counsel is provided by given limited time to assess the claims.").

As for petitioner's argument that he was unaware of the requirement to raise all grounds of which he "could have been aware" in his 24.035 motion, petitioner cites *Ashby v. Wyrick*

for the proposition that a state procedure which is confusing or ambiguous may be inadequate to bar consideration of a claim in a federal habeas proceeding. 693 F.2d 793-94. In *Sloan v. Delo*, the Eighth Circuit was faced with the identical argument. 1995 WL 286719.

The court found that a "sensible reading" of the language contained in Missouri's post convictions statutes "reveals that the meaning of 'every ground known to the movant' must include claims based on facts which the defendant could reasonably discover." *Id.* at *5. The court found that because the purpose the rule is to expedite the review of criminal convictions, the language claimed to be unclear was capable of only one reasonable interpretation. *Id.* The court went on to state that "[i]f movants were allowed to delay the filing of a claim by failing to investigate the predicate facts or legal theory, the purpose of the rule would be undermined. *Id.*

In the present case, petitioner argues that he presented all "known" claims in his Rule 24.035 motion but presented later discovered constitutional claims to the Missouri Supreme Court in a petition for writ of habeas corpus in an attempt to comply with Missouri's "ill-defined" procedures. The claims presented in petitioner's state habeas corpus relate to an alleged error in the guilty plea transcript. The original guilty pleas transcript reads as follows:

Q. "Did you know it was wrong to cut him?"

A. "Yes."

Q. "--when you didn't see a weapon?"

A. "Well,--"

Q. "Let me rephrase it. Go ahead?"

A. "My reaction was indicative [sic] behavior."

Guilty Pleas Transcript, pp. 20-21. Petitioner alleges that he realized later that he had used the word "indicative" rather than instinctive. On March 31, 1992, the trial court issued an Order amending the transcript. Petitioner claims that the corrected transcript supports his argument that there is no evidence to support petitioner's guilty pleas in that petitioner did not possess the requisite intent for the crime of assault. Petitioner contends that without the benefit of a corrected transcript, he was unaware of possible claims regarding his mental state.

Petitioner, however, had the transcript available to him at the time of his original 24.035 filing. (Petitioner's Exhibit 8). Therefore, petitioner knew or could have reasonably discovered the fact necessary to present this claim when he filed his motion for post-conviction relief, even without the benefit of a corrected transcript. This ground was "known to movant" and the rule was sufficiently clear to require petitioner to present this ground in his rule 24.035 motion. *See Sloan v. Delo, supra* at *6. Consequently, there exists an independent and adequate state procedural bar which precludes federal review of petitioner's claims not presented in his motion for post-conviction relief.

Alternatively, petitioner asserts that the summary denial of petitioner's Rule 91 petition for habeas corpus by the Missouri Supreme Court was a denial on the merits and was not based on a procedural bar which would preclude federal review of these claims. (Respondent's Exhibit A). Respondent relies on *Byrd v. Delo*, 942 F.2d 1226 (8th Cir.), *stay denied*, 112 S. Ct. 17 (1991), to support the proposition that a summary denial of petitioner's habeas corpus petition must be viewed as enforcement of a procedural bar. *Id.* at 1232.

In *Byrd*, the Eighth Circuit found that because the Missouri Supreme Court was silent as to the underlying grounds

and reasons for its denial of petitioner's habeas petition, the decision did not "fairly appear to rest primarily on federal law, or to be interwoven with the federal law . . . " *Id.* at 1231, *quoting, Coleman*, 502 U.S. at 2557. The court further held that the state court decision, although not explicit, rested on an obvious procedural bar, "that Rule 91 cannot be used as a vehicle for raising questions that could have been raised in a [Rule 24.035] proceeding . . . " *Id.* at 1232. The court found that it knew of no case where the Missouri Supreme Court granted or denied relief on a Rule 91 petition that presented claims which could have been raised earlier in a motion for post-conviction relief. The court held that "there is no reason to construe an unexplained Rule 91 denial as opening up the merits of a previously defaulted federal issue."[3]

As petitioner points out, in *State ex rel. Simmons v. While*, the Missouri Supreme Court did identify certain claims which were cognizable in a Rule 91 proceeding. 866 S.W. 2d 443 (Mo. banc 1993). Petitioner, however, has failed to raise any claims for which state habeas review would be available. *Id.* at 445-46 (holding that state habeas review is available only to raise jurisdictional issues or in circumstances "so rare and exceptional that a manifest injustice results"). In Simmons, the court additionally noted that absent "rare and exceptional circumstances," state habeas is not an available remedy for claims

3 Petitioner argues that the Eighth circuit decision of *Pilkerton v. Groose*, 30 F.3d 1009 (8th Cir. 1994) called into question the court's holding in *Byrd*. In *Pilkerton*, the court noted that even if a claim is procedurally defaulted under state law, the state courts are free to decide it on the merits. *Id.* at 1010. It then questioned whether the Missouri Supreme Court's summary denial of Pilkerton's state habeas was based on a procedural default or on the merits. Although the court addressed the merits of petitioner's claim it did not do so because it found the summary denial of petitioner's claims was a decision on the merits. Rather, the court declined to address that procedural question because it found that petitioner's claims would be denied on the merits in any event. Consequently, the Eighth Circuit holding in *Byrd* is still applicable to petitioner's case.

which have been defaulted on post-conviction review. Id. at 446. Therefore, this court finds that the summary denial of petitioner's state habeas petition was not a decision on the merits which would allow federal review of petitioner's claims defaulted in state court.

Finally, petitioner contends that despite any procedural bar which may exist, petitioner has shown "cause and prejudice" sufficient to overcome any bar to federal review. In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court held:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. Therefore, absent a showing of cause, prejudice or fundamental miscarriage of justice, petitioner's claims in are barred from federal review.

Petitioner has presented four claims in his present habeas petition. Of those claims, only claims 2(b), (d), (e), and part of claim 4 were presented in petitioner's Rule 24.035 motion for post-conviction relief. Petitioner has defaulted on these claims for his failure to appeal the denial of his motion for post -conviction relief. Petitioner's claims 1, 2(a), (c), 3 and 4 were not presented in petitioner's motion for post-conviction relief but were raised by petitioner in a state motion pursuant to Rule 91. As stated previously, petitioner's failure to raise these claims in his Rule 24.035 motion is an indepen-

dent and adequate procedural bar to federal review.

To overcome this procedural bar, petitioner must show cause for and prejudice resulting from the procedural default. The Supreme Court has found that "the existence of cause must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

As cause for petitioner's failure to appeal the denial of his post-conviction motion, petitioner states that he was not aware that his failure to appeal the denial of his post-conviction motion would result in a procedural bar to federal review of his claims. (Petitioner's Traverse, p. 12). Petitioner additionally asserts that the had no confidence in the court and was told by his counsel that he had little chance of success.

It should first be noted that ineffective assistance of post-conviction counsel cannot constitute cause for a procedural default. *Coleman*, 501 U.S. at 755. This is true even if petitioner's post-conviction proceeding was the first time he could raise these claims. *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992). Therefore, counsel's alleged advice to petitioner may not excuse the procedural default. Furthermore, because cause must be something "external" to petitioner, petitioner's lack of understanding concerning the consequences of his failure to do so cannot constitute cause for his procedural default. See *Vaughn v. Groose*, No. 90-0804, 1995 WL 262886 at *5 (W.D. Mo 1995); *Duvall v. Purkett*, 15 F.3d at 748 (petitioner's alleged ignorance is not an external impediment to a procedural default); *Cheek v. State*, 776 S.W.2d 66 (Mo App. 1989).

As cause for his failure to raise certain claims in his post-conviction motion, petitioner argues that his failure to raise

these claims as due to an error in the guilty plea transcript.[4] Petitioner states that because the transcript was not corrected until after petitioner's Rule 24.035 proceeding were concluded, petitioner could not have presented these claims in this post-conviction motion. Rule 24.035, however, requires petitioner to present every claim "known to him."[5] Because petitioner has the transcript available to him at the time of his original 24.035 filing, a corrected transcript was not necessary in order for petitioner to have raised his claims in his motion for post-conviction relief. Therefore, petitioner has failed to show cause for his procedural default.

Absent a showing of cause and prejudice, petitioner must show that failure to review his claims would result in a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. 489, 495-96 (1986). Petitioner claims that because he was unaware of the elements of the crime, he was unable to assert his innocence at the time of his conviction. Petitioner claims that because there is evidence that he is "actually innocent" of the crime the interests of justice require review of petitioner's claims. *Id.*

Petitioner asserts that he is actually innocent of the crime because he acted "instinctively" rather than "knowingly". The fundamental miscarriage of justice exception applies to claims of actual or factual innocence as opposed to legal innocence. *Narcisse v. Dahm*, 9 F.3d 38, 40 (8th Cir. 1993). Because petitioner does not argue that he did not commit the assault, his argument is more one of legal than factual innocence. Consequently, petitioner claim is not the type of "extraordinary case" to which the miscarriage of justice exception applies. *Murray v. Carrier*, 477 U.S. at 495-96. *See also Sawyer v. Whitley*, 112 S. Ct. 2514, 2519-23 (1992).

4 See page 6 for text of transcript.

5 *See supra*, note 1.

Even if this court were to construe petitioner's claim to be that of factual rather than legal innocence, the actual innocence exception is still not available to petitioner. Petitioner's claim is that the acted instinctively rather than knowingly. It is clear from the guilty pleas transcript, however, that petitioner had knowledge of his actions. During the guilty pleas hearing, petitioner was asked whether he "knowingly caused serious injuries to James Hodgon by cutting him" to which he answered "yes". (Transcript, p.19). The transcript also indicates that petitioner admitted cutting the victim several times with a knife after the victim allegedly hit petitioner with his fist. (Transcript, p. 20). Based on a review of the record, this court does not feel that petitioner has shown that "it is more likely than not that no reasonable juror would have convicted him . . . " *Schlup v. Delo*, 115 S. Ct. 851, 867 (1995). Therefore, federal review is not required to prevent a fundamental miscarriage of justice on grounds defaulted in state court proceedings. *Murray v. Carrier*, 477 U.S. at 496.

After review of the record in this case this court finds that an evidentiary hearing is not necessary in the above-captioned action. Based on the above discussion, petitioner's habeas corpus petition will be denied.

Accordingly, it is hereby ORDERED that petitioner's petition for writ of habeas corpus is DENIED. It is further ORDERED that petitioner's motion for an evidentiary hearing is DENIED.

Dated: July 05, 1995
Kansas City, Missouri

Fernando J. Gaitan, Jr.
United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

MISSOURI SUPREME COURT RULES

RULE 24. MISDEMEANORS OR FELONIES—ARRAIGNMENT AND PROCEEDINGS BEFORE TRIAL

RULE 24.035 CONVICTION AFTER GUILTY PLEA—CORRECTION

(a) **Nature of Remedy—Rules of Civil Procedure Apply.** A person convicted of a felony on a plea of guilty and delivered to the custody of the department of corrections who claims that the judgment of conviction or sentence imposed violate the constitution or laws of this state or the constitution of the United States, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 24.035. This Rule 24.035 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure before the trial court is governed by the Rules of Civil Procedure insofar as applicable.

(b) **Form of Motion—Time to File—Cost Deposit Not Required—Failure to File, Effect of.** A person seeking relief pursuant to this Rule 24.035 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40. No cost deposit shall be required. The motion shall be filed within ninety days after the movant is delivered to the custody of the department of corrections. Failure to file a motion within the time

provided by this Rule 24.035 shall constitute a complete waiver of any right to proceed under this Rule 24.035.

(c) **Clerk's Duties.** Movant shall file his motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion the clerk shall notify the sentencing judge.

(d) **Contents of Motion.** The motion to vacate shall include every ground known to the movant for vacating, setting aside or correcting the judgment or sentence. The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion.

(e) **Pro Se Motion—Appointment of Counsel—Amended Motion, Required When—Withdrawal of Appointed Counsel.** When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the grounds are asserted in the motion and whether the movant has included all grounds known to him as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all grounds known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and grounds. For good cause shown, appointed counsel may be permitted to withdraw. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed. —

(f) **Amended Motion—Form, Time for Filing—Response by Prosecutor.** Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for

filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within ten days after the date an amended motion is required to be filed.

(g) **Request for Hearing, Time for Filing—Hearing, Not Required, When—Time Hearing to Be Held.** A request for a hearing shall be made by motion on or before the date an amended motion is required to be filed. Within fifteen days after the date an amended motion is required to be filed, the court shall determine whether to grant a hearing. If no request for hearing is timely filed or if the motion and the files and record of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. If a hearing is ordered, it shall be held within sixty days of the date of the order granting a hearing.

(h) **Presence of Movant—Record of Hearing—Continuance of Hearing—Burden of Proof.** At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving his grounds for relief by a preponderance of the evidence.

(i) **Findings and Conclusions, Issued, When—Judgment.** The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held, within thirty days of the submission of the case. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence him or order a new trial or correct

the judgment and sentence as appropriate.

(j) **Appeal—Standard of Appellate Review.** An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering same. If the sentencing court finds against the movant on the issue of indigency and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigency so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this Rule 24.035 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.

(k) **Successive Motions.** The circuit court shall not entertain successive motions.

(l) **Schedule.** This Rule 24.035 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1988. If sentence is pronounced prior to January 1, 1988, and no prior motion has been filed pursuant to Rule 27.26, a motion under this Rule 24.035 may be filed on or before June 30, 1988. Failure to file a motion on or before June 30, 1988, shall constitute a complete waiver of the right to proceed under this Rule 24.035. If a sentence is pronounced prior to January 1, 1988, and a prior motion under Rule 27.26 is pending, post-conviction relief shall continue to be governed by the provisions of Rule 27.26 in effect on the date the motion was filed.

RULE 91. HABEAS CORPUS

RULE 91.01 WHO MAY PETITION FOR A WRIT OF HABEAS CORPUS—FORM OF ACTION

Any person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint. Custody of a child may be the subject of a proceeding in habeas corpus. A habeas corpus proceeding shall be a civil action in which the person seeking relief is petitioner and the person against whom such relief is sought is respondent. If appropriate, there may be multiple petitioners or multiple respondents.

MISSOURI STATUTES

MO. REV. STAT. §565.050.1

A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

MO. REV. STAT. §562.016.3

A person "acts knowingly", or with knowledge,

(1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or

(2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

U.S. CONSTITUTIONAL PROVISIONS

U.S. CONST., AMEND. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. STATUTES

28 U.S.C. §2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish

or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise ap-

pears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.